No. 84-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

MASSACHUSETTS MUTUAL LIFE INSURANCE COMPANY,
and CECILIA STEVENSON,
Petitioners,

v.

DORIS RUSSELL,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE A BRIEF AMICI CURIAE AND BRIEF FOR ALASKA FISHERMEN'S UNION— SALMON CANNERS PENSION TRUST, ALASKA FISHERMEN'S UNION— SALMON CANNERS WELFARE TRUST, ALASKA PLUMBING & PIPEFITTING INDUSTRY PENSION TRUST FUND, MONTANA TEAMSTER EMPLOYERS TRUST, NATIONAL SHOPMEN PENSION FUND, NORTHWEST METAL CRAFTS TRUST FUND, OREGON TEAMSTER EMPLOYERS TRUST, PRINTING SPECIALTIES AND PAPER PRODUCTS JOINT EMPLOYER AND UNION HEALTH AND WELFARE FUND, RETAIL CLERKS PENSION TRUST, RETAIL CLERKS WELFARE TRUST, SOUTHERN CALIFORNIA LUMBER INDUSTRY HEALTH AND WELFARE FUND, SOUTHERN CALIFORNIA LUMBER INDUSTRY RETIREMENT FUND, AND SPOKANE AREA HOTEL AND RESTAURANT EMPLOYEES TRUST FUND

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The above-captioned movants hereby respectfully move this Court, pursuant to Rule 36.1 of the Supreme Court Rules, for leave to file the attached brief amici curiae in this case. The consent of the attorney for the petitioner has been obtained. The consent of the attorney for the respondent was requested but refused.

The interest of the movants arises because they are multiemployer pension and health and welfare plans organized under the authority of the Taft-Hartley Act and the Employee Retirement Income Security Act (ERISA).

The Alaska Fishermen's Union—Salmon Canners Pension Trust is a pension plan with 1,191 participants and 13 contributing employers. It received 40 claims during its last reporting year. The Alaska Fishermen's Union—Salmon Canners Welfare Trust is a health and welfare plan with 1,122 participants and 13 contributing employers. It received 893 claims during its last reporting year. The Alaska Plumbing & Pipefitting Industry Pension Trust Fund is a pension plan with 1,357 participants and 200 contributing employers. It received 49 claims during its last reporting year. The Montana Teamster Employers Trust is a health and welfare plan with 1,904 participants and 179 contributing employers. It received 28,600 claims during its last reporting year. The National Shopmen Pension Fund is a pension plan with 17,000 participants and 283 contributing employers. It received 480 claims during its last reporting year. The Northwest Metal Crafts Trust Fund is a health and welfare plan with 5,695 participants and 139 contributing employers. It received 20,000 claims during its last reporting year. The Oregon Teamster Employers Trust is a health and welfare plan with 17,600 participants and 993 contributing employers. It received 58,200 claims during its last reporting year. The Printing Specialties and Paper Products Joint Employer and Union Health and Welfare Fund is a health and welfare plan with 8,400 participants and 126 contributing employers. It received 102,000 claims during its last reporting year. The Retail Clerks Pension Trust is a pension plan with 25,153 participants and 738 contributing employers. It received 258 claims during its last reporting year. The Retail Clerks Welfare Trust is a welfare plan with 17,100 participants and 667 contributing employers. It received 222,672 claims during its last reporting year. The Southern California Lumber Industry Health and Welfare Fund is a health and welfare plan with 8,200 participants and 560 contributing employers. It received 42,000 claims during its last reporting year. The Southern California Lumber Industry Retirement Fund is a pension plan with 7,600 participants and 460 contributing employers. It received 420 claims during its last reporting year. The Spokane Area Hotel and Restaurant Employees Trust Fund is a health and welfare plan with 659 participants and 25 contributing employers. It received 4,263 claims during its last reporting year. Together, these plans processed 479,775 claims during their last reporting year.

The movants seek to file a brief in this matter because of the important public issues that are raised by the petition. This case has extraordinarily severe implications for the administration and financial well-being of all employee benefit plans. Petitioners, who are a single employer plan and an employee of the plan sponsor, have raised these issues from the perspective of single employer plans. The movants seek leave to inform the court of the particularly severe consequences which the Ninth Circuit's ruling will have for multiemployer employee benefit plans.

The Ninth Circuit ruled that fiduciaries of employee benefit plans may, under ERISA, be personally liable to a plan participant or beneficiary for punitive or compensatory damages for improper or untimely processing of claims. This ruling, if not reversed, will profoundly alter the administration of multiemployer plans. The

ruling is inconsistent with the plain language of ERISA and with the holdings of other circuits.

Respectfully submitted,

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QUESTION PRESENTED

Whether, under the Employee Retirement Income Security Act a fiduciary of an employee benefit plan may be held personally liable to a plan participant or beneficiary for punitive or compensatory damages for improper or untimely processing of claims?

PARTIES TO THE PROCEEDING

Massachusetts Mutual Life Insurance Company*

Cecilia Stevenson

Doris Russell

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* The following are non-wholly owned subsidiaries of the Massachusetts Mutual Life Insurance Company as well as companies that may be deemed affiliates thereof:

MML Blend Investment Company, Inc.

MML Equity Investment Company, Inc.

MML Managed Bond Investment Company, Inc.

MML Money Market Investment Company, Inc.

MML Bay State Life Insurance Company

MassMutual Corporate Investors, Inc.

MassMutual Income Investors, Inc.

MassMutual Mortgage and Realty Investors

MassMutual Liquid Assets Trust

Maslif One & Co.

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**BRIEF AMICI CURIAE OF
IN SUPPORT OF PETITIONER
ALASKA FISHERMEN'S UNION—
SALMON CANNERS PENSION TRUST,
ALASKA FISHERMEN'S UNION—
SALMON CANNERS WELFARE TRUST,
ALASKA PLUMBING &
PIPEFITTING INDUSTRY PENSION TRUST FUND,
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NORTHWEST METAL CRAFTS TRUST FUND,
OREGON TEAMSTER EMPLOYERS TRUST,
PRINTING SPECIALTIES AND
PAPER PRODUCTS JOINT EMPLOYER AND
UNION HEALTH AND WELFARE FUND,
RETAIL CLERKS PENSION TRUST,
RETAIL CLERKS WELFARE TRUST,
SOUTHERN CALIFORNIA LUMBER INDUSTRY
HEALTH AND WELFARE FUND,
SOUTHERN CALIFORNIA LUMBER
INDUSTRY RETIREMENT FUND,
AND SPOKANE AREA HOTEL
AND RESTAURANT EMPLOYEES TRUST FUND**

The amici curiae respectfully submit this brief in support of the petition filed for a writ of certiorari in the above-captioned case.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 722 F.2d 482 (9th Cir. 1983), and appears in the Appendix to the petition at pages 1a to 25a. The order of the United States District Court for the Central District of California granting petitioner's motion for summary judgment, as well as the findings of fact and conclusions of law issued in connection therewith, are unreported and appear in the Appendix to the petition at pages 26a to 32a.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Ninth Circuit was entered on December 16, 1983. A timely petition for rehearing and suggestion for rehearing en banc was denied by that Court on April 6, 1984. Appendix to petition at page 34a. The petition for writ of certiorari was docketed on July 5, 1984. The jurisdiction of this Court is invoked by petitioners pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

This case involves Sections 409, 501, 502 and 503 of the Employee Retirement Income Security Act of 1974, as amended (ERISA), 29 U.S.C. §§ 1109, 1131, 1132, and 1133, and 29 C.F.R. § 2560.503-1 promulgated pursuant to ERISA Section 503. These provisions are reproduced in the Appendix to the petition at pages 35a to 84a.

STATEMENT OF THE CASE

Respondent, Doris Russell (Russell), was an employee of a California office of the petitioner, Massachusetts Mutual Life Insurance Company (Mass Mutual). Mass Mutual sponsors two employee benefit plans which provide disability benefits to eligible employees. Both plans are provided at no cost to employees and are funded by

the general assets of the company. Both plans are covered by ERISA.[1]

Russell filed a disability claim under the salary continuance plan in May, 1979, asserting that she could not work because of a back problem. Mass Mutual began payment of benefits.

In August, 1979, the claim was reviewed by Mass Mutual's Disability Committee. The Disability Committee referred Russell to an orthopedic surgeon. In September, 1979, this specialist examined Russell and concluded that, from an orthopedic perspective, she was not physically disabled. On October 17, 1979, Russell was notified that disability payments would be discontinued upon the recommendation of the Disability Committee. Russell was also advised of her right to appeal that decision to the Plan Administrator.

On October 22, 1979, Russell wrote to the Director of Group Claims (not to the Plan Administrator) and asked for additional information regarding the termination of her benefits and for an application for long-term disability benefits. She also stated her intention to appeal the termination of her disability benefits and to submit additional medical information.

On November 27, 1979, Russell wrote to the Plan Administrator concerning her appeal and submitted additional evidence, including a report from her psychiatrist which indicated that she was suffering from a psychosomatic disability with physical manifestations rather than an orthopedic disability.

The Mass Mutual Plan Administrator treated Russell's letter of November 27, 1979 as a formal appeal and referred it to the Disability Committee. Russell was examined by an independent psychiatrist, who confirmed

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[1] Petitioner Cecilia Stevenson, an employee of Mass Mutual, was Russell's supervisor at Mass Mutual. Amici Curiae accept petitioner's statement of the case, but provide a synopsis of it herein.

[2] Other employment-related claims were also asserted; the only claim addressed herein by the amici curiae is Russell's claim with respect to her disability benefits.

that Russell suffered from a psychiatric disability in a report dated February 15, 1980. On the basis of this report, the Disability Committee recommended that Russell's benefits be reinstated retroactively. The Plan Administrator adopted this recommendation and informed Russell of his decision on March 11, 1980. Payment of all benefits due was made two days later.

Although she received full benefits from both plans, Russell sued Mass Mutual in California Superior Court on December 9, 1980 for compensatory and punitive damages for the untimely and improper handling of her benefit claim,[2] which allegedly resulted in economic loss and mental anguish.[3]

After removal of the case to the United States District Court for the Central District of California on the ground that the case was governed by ERISA,[4] the District Court granted a motion by Mass Mutual for summary judgment. The court first held that all of Russell's state law claims arising from the processing of her claim for disability benefits were pre-empted by ERISA. The court then concluded that, as a matter of law, punitive and compensatory damages are not available to plan participants under ERISA. By so ruling, the court tacitly acknowledged that a plan participant only has a claim against the plan for non-payment of benefits and costs of litigation, including fees. Because Russell had been paid benefits in full, she was not entitled to any additional relief. The court found that Russell's appeal was filed on November 27, 1979 and rejected her contention

[3] Russell claimed, *inter alia*, that Mass Mutual's delay forced her husband, who was also unemployed on the grounds of disability, to cash out his retirement savings plan. Russell alleged that she and her husband lost the security of lifetime benefits. Russell also sought damages for emotional distress and claimed that her pre-existing psychosomatic illness was aggravated as a result of the improper and untimely handling of her claim.

[4] Mass Mutual removed this action pursuant to 28 U.S.C. § 1441(a), alleging the existence of federal jurisdiction under 29 U.S.C. § 1132(e)(1) and 28 U.S.C. § 1331(a).

that she was entitled to damages because her claim had not been processed in 120 days, as required by regulations promulgated under ERISA Section 503, 29 U.S.C. § 1133. See 29 C.F.R. § 2560.503-1(h) (1983).[5]

The Ninth Circuit affirmed the District Court's holding that Russell's state law claims were pre-empted by ERISA. However, the Ninth Circuit reversed the District Court's grant of summary judgment. The appellate court held that Russell's complaint had stated a claim under ERISA for breach of fiduciary duty based on the allegedly improper or untimely handling of her appeal. The Court of Appeals determined that Russell's appeal began with her initial letter of October 22, 1979 and that Mass Mutual, therefore rendered its final determination *twelve days* beyond the 120-day limit.

The Court of Appeals went on to hold that such a claim could support an award of both compensatory and punitive damages. The appellate court based its opinion on an interpretation of ERISA Section 409, 29 U.S.C. § 1109. It held that Section 409, which expressly imposes personal liability to the plan for fiduciary breaches, also make fiduciaries personally liable to individual participants with respect to benefit claims. The Ninth Circuit is the only appellate court to have held that Section 409 authorizes punitive damages against plan fiduciaries by individual participants for denial of a benefit claim.

[5] The regulations which require benefit claims to be decided within 120 days do not provide affirmative relief. These regulations simply provide that, in the event of the plan's failure to render a decision within that time, "the claim shall be deemed denied on review." 29 C.F.R. § 2560.503-1(h)(4). The participant can then file suit under ERISA Section 502 without fear that a defense of failure to exhaust remedies can be raised.

REASONS FOR GRANTING THE WRIT

I. The Ninth Circuit's Ruling that Punitive Damages are Available to Plan Participants and Beneficiaries Conflicts with Rulings of the Eighth Circuit and Numerous District Courts

The Ninth Circuit's holding in *Russell v. Mass. Mutual Life Ins. Co.*, 722 F.2d 482 (9th Cir. 1983) that awards of punitive damages are permissible under ERISA was subsequently restated in *Winterrowd v. Freedom & Co.*, 724 F.2d 823 (9th Cir. 1984). In the latter case, the Court affirmed an award of punitive damages against a contributing employer to a multiemployer fund. *Russell* and *Winterrowd* directly conflict with the Eighth Circuit's reasoning in *Dependhal v. Falstaff Brewing Corp.*, 653 F.2d 1208 (8th Cir. 1981), cert. denied, 454 U.S. 968 (1981), in which that court stated:

> We do not think that punitive damages are provided for in ERISA. Ordinarily punitive damages are not presumed; they are not the norm; and nowhere in ERISA are they mentioned. If Congress had desired to provide for punitive damages; it could have easily so stated, as it had in other acts.

653 F.2d at 1216; see also *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820, 825-26 (7th Cir. 1984), which held that punitive damages are not available in an action for plan benefits under ERISA Section 502(a)(1)(B).

In addition to this conflict between Circuit courts, there is sharp conflict among the numerous district court decisions that address the availability of punitive damages under ERISA. These decisions are comprehensively listed at pages 7-8 of the petition, and we respectfully refer the Court to those citations.

II. The Ninth Circuit's Ruling is Inconsistent with the Statutory Scheme and Language of ERISA and Gives a Windfall Reward to Participants

ERISA specifically differentiates between remedies available to plans as a whole and to individual par-

ticipants and beneficiaries. The Ninth Circuit has completely ignored these distinctions and, in effect, has rewritten the remedial provisions of the Act.

As this court has observed, ERISA is a "comprehensive and reticulated statute" in which Congress established many detailed rules to further "the well-being and security of millions of employees and their dependents" and to remedy the numerous flaws in the private pension plan system. *Nachman Corp. v. PBGC*, 446 U.S. 356, 361 (1980), reh. denied 448 U.S. 908 (1980). Among the most significant changes wrought by ERISA were the strict rules for fiduciary behavior and the personal liability imposed upon fiduciaries for any breach of their duties. The rules of fiduciary behavior are extensive, and include the following:

> a rule which prohibits sales or exchanges between the plan and "parties in interest" and "disqualified persons" (ERISA Section 406; ERISA Section 2003);
>
> a prudent person rule which provides a standard by which fiduciaries' investment and other asset disposition decisions are judged (ERISA Section 404(a)(1)(B));
>
> an "exclusive purpose" rule, which requires that a plan be administered with the exclusive purpose of providing benefits (ERISA Section 404(a)(1)(A));
>
> a prohibition against compensation for fiduciaries who are full time employees of unions or employers (ERISA Section 408(a)(2)); and
>
> a prohibition against any self-dealing by fiduciaries (ERISA Section 406(b)).

These fiduciary rules have one thing in common: they are obligations to the plan as a whole, rather than simply to individual participants.

All breaches of the fiduciary rules are grounds for an enforcement action against plan fiduciaries, even if the breaches do not cause monetary damage to the plan. Fiduciaries are "personally liable to make good to [the]

plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary." ERISA Section 409(a), 29 U.S.C. § 1109(a). Fiduciaries are subject to removal for fiduciary breaches and to "other equitable or remedial relief" deemed appropriate by the court.

It is important to note that ERISA Section 409 provides equitable and remedial relief for fiduciary breaches *only* to plans as a whole, *not* to individual participants.[6]

Relief for individual participants and beneficiaries who have been denied benefits is exclusively pursuant to ERISA Section 502(a)(1)(B), 29 U.S.C. § 1132(a)(1)(B). This provision does not permit the imposition of personal liability upon fiduciaries for any compensatory or punitive damages to individual participants or beneficiaries. It limits benefit claimants to recovery of benefits due from the plan and costs of litigation, including attorneys' fees.

The different remedial provisions of Section 409 and 502 reflect the delicate balance struck by Congress among the significant purposes served by ERISA: (1) the deterrence of fiduciary malfeasance; (2) the promotion of the expansion of the private pension plan system; and (3) the securing of benefits due to individual participants and beneficiaries. Congress balanced the prophylactic effect of the imposition of personal liability upon fiduciaries as a deterrence for malfeasance against the need to promote expansion of pension plans. Congress determined that personal liability to the plan for fiduciary breaches would deter malfeasance, but that excessive imposition of per-

[6] ERISA's legislative history confirms that any recovery under Section 409 necessarily benefits the plan as a whole. See, e.g. H. Conf. Rep. No. 1280, 93d Cong., 2nd Sess. 320 (1974) (personal liability of fiduciary for losses to the plan resulting from fiduciary breach) and S. Rep. No. 127, 93d Cong., 1st Sess. 33 (1973) (personal liability of fiduciary to reimburse fund for losses resulting from fiduciary breach and to turn over any profits obtained by use of fund assets).

sonal liability (such as was created by the Ninth Circuit) would hamper creation of new plans, the expansion of existing ones, and the recruitment of plan trustees.

Congress, in balancing competing concerns clearly felt that the prophylactic measures (of personal liability) designed to deter abuses of plan resources were not an appropriate way of dealing with errors made in the processing of individual claims. Balancing the need for encouraging accuracy in individual claim processing against its policy of promoting pension plan expansion, Congress authorized full recovery of benefits due to individuals from plans as well as costs of litigation (including attorneys' fees), but did not go so far as to impose personal liability upon plan fiduciaries for either compensatory or punitive damages. Thus, ERISA deters malfeasance in the management of plans, provides remedies to individual claimants, and yet does not set up barriers to the expansion of the private pension system. This Court has previously affirmed, in similar sorts of statutes, the need for a "careful balance of individual and collective interests." *Electrical Workers v. Foust*, 442 U.S. 42, 48 (1979) (which case holds that punitive damages are not available for claims of breach of duty of fair representation under the Railway Labor Act, 45 U.S.C. §§ 151 et seq.).

The Ninth Circuit upset the careful balance struck by ERISA without any justification. The imposition of personal liability upon plan fiduciaries for prior errors in claims processing does not significantly add to the prophylactic effect of the measures expressly provided by Congress to deter fiduciary malfeasance. Neither does it add to the ability of individual participants to secure benefits. Benefits are already well secured under the benefit recovery provisions of Section 502.[7] But, the Ninth Circuit's ruling has extremely deleterious effects on plans. It adversely alters the decision-making procedures of plan trustees and, by discouraging responsible persons from

[7] Indeed, an award of punitive damages would be a windfall to a benefit claimant.

serving as trustees, discourages the expansion of the private pension plan system. The amici curiae now turn to a discussion of these consequences as they apply to multiemployer plans.

III. The Ninth Circuit's Ruling is of Great Public Importance Because it has a Severe Adverse Impact on Multiemployer Benefit Plans and their Participants

Multiemployer plans are integral to the financial security of millions of Americans. The Ninth Circuit's ruling will injure multiemployer plan administration, deter qualified individuals from serving as plan fiduciaries, discourage the process of dispute resolution established by ERISA, and expose fiduciaries to liabilities that they cannot estimate and against which they may be unable to insure themselves. The cumulative effect of this is to undetermine the stability of multiemployer plans and thereby effectively halt their expansion.

A. The Nature and Importance of Multiemployer Benefit Plans to the Retirement Security and to the Health and Welfare Benefits of Millions of Employees

Multiemployer employee benefit plans play a vital role in the financial well-being of millions of individual workers. They enable the employees of small and medium sized companies to obtain the level of pension and health and welfare benefits only available from large plans. They permit employees who work for more than one employer in the same industry to accumulate meaningful pension benefits. They also protect pension benefits when an employer leaves the plan. Multiemployer plans support two important features of the American economy: small businesses and a mobile workforce.

Small and medium sized companies often cannot afford sophisticated and generous employee benefits such as those provided by large corporate plans. Large employee benefit plans can profit from substantial economies of scale and can also accurately reflect the science of "averages," which forms the basis of actuarial predictions. An

increase in plan size considerably reduces the risk that a plan may suffer financial adversity because its benefit claims experience does not accurately mirror statistical predictions.

Of similar importance is the need to provide a form of "portable" pension benefits. Because multiemployer pension plans generally include many employers in an industry, an employee moving from one employer in the plan to another continues to accumulate benefits without interruption. Multiemployer plans also protect pension benefits because they provide benefits to an employee even though his or her employer leaves the plan.

Congress has recognized that multiemployer plans "typically provide workers with greater retirement security than single employer plans." Senate Labor Committee Summary and Analysis of Consideration of S.1076 (April 1980) U.S. Code Cong. & Admin. News, p. 2985. Accordingly, Congress has repeatedly passed legislation to strengthen multiemployer plans. The most comprehensive effort in this regard was the Multiemployer Pension Plan Amendments Act of 1980, which amended ERISA by imposing withdrawal liability upon employers who withdraw from multiemployer pension plans. Section 3 of the Act explicitly states that it is Congressional policy to encourage the maintenance and growth of multiemployer pension plans.[8]

Multiemployer benefit plans are established through collective bargaining agreements. The Taft-Hartley Act of 1947 specifically provided for the formation of trusts to administer health and welfare and pension funds for

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[8] The 1980 Amendments to ERISA were enacted by Pub. L. No. 96-364, 94 Stat. 1208-1311 (1980). For further discussion of Congressional policy to encourage the maintenance and growth of multiemployer pension plans, see House Ways and Means Committee Report on H.R. 3904 (Rept. 96-869, Part II, April 23, 1980) and House Labor Committee Report on H.R. 3904 (Rept. 96-869, Part I, April 2, 1980).

employees represented by labor unions in collective bargaining with management, 29 U.S.C. § 186(c)(5) and (6). The law also required such plans to be managed by trustee boards equally divided between representatives of management and of labor organizations. See *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981) for a description of the functioning of such trustees. Multiemployer trustees are familiar with the particular needs of their industry and are best able to design plans to fit those needs.

Multiemployer benefit plans cover millions of American workers. Multiemployer pension plans are primarily defined benefit plans. While multiemployer pension plans represent only 3.2% of all defined benefit pension plans, they provide coverage to 20-26% of all American nonfarm workers covered by such plans.[9] In 1980, there were 1,826 multiemployer pension plans in the country, with a total of 10 million active and retired participants.[10] There were also 4,500 multiemployer health and welfare funds, of which 3,040 provided basic hospitalization and other health benefits to 8.1 million participants.[11] Multiemployer pension plans process hundreds of thousands of benefit claims each year. Multiemployer health and welfare plans process millions of claims annually. All of these claims are processed by trustees or by administrators acting on their behalf.

[9] Cooper, Robert D., ***Pension Fund Operations and Expenses (Pension Fund Operations)***, p. 21 (1980) International Foundation of Employee Benefit Plans, Inc. Brookfield, Wisconsin.

[10] Cooper, Robert D., ***Pension Fund Operations***, p. 22 n.5.

[11] The other 1,460 health and welfare plans provide other benefits, such as vacation, unemployment, etc. Cooper, Robert D., ***Multiemployer Health and Welfare Plan Operations and Expenses***, p. 14 n.5 (1983) International Foundation of Employee Benefit Plans, Inc. Brookfield, Wisconsin.

B. The Ninth Circuit's Ruling will Severely Injure Multiemployer Benefit Plans and their Participants because it will Deter the Prudent and Careful Administration of Such Plans

The financial well-being of multiemployer benefit plans, and of their participants and beneficiaries, is dependent upon careful, prudent and reasonable management of all aspects of the plan, including the area of benefit claims processing.

Plan trustees design benefit systems and devise and implement procedures for processing and evaluating claims. While it is, of course, important to make prompt payment of all justified claims, it is likewise important to refuse payment of claims that do not meet plan requirements. Indeed, ERISA Section 404(a)(1)(d) mandates this. If plan requirements were not scrupulously followed, plan assets would be squandered and the benefit security of all participants would be undermined. For instance, if a pension plan has a 10-year vesting provision, and is funded accordingly, the trustees must not pay benefits to a participant who has accumulated 9 years and 11 months of pension service. Plan trustees must balance the interest of the individual benefit claimant against the interest that all participants have in safeguarding the plan's assets by accurate and prudent claim administration.

ERISA safeguards individual rights by providing the right to obtain accurate data regarding plan benefits and by requiring prompt claim processing. ERISA section 503 provides that plans must provide "adequate notice" of any benefit denial, "written in a manner calculated to be understood by the participant," and that plans must provide "reasonable opportunity" for a "full and fair review" of any benefit denial.

ERISA Section 404, § 29 U.S.C. § 1104, requires that fiduciaries act prudently with respect to the plan. They must not make benefit determinations arbitrarily or capriciously. "The trustees of a . . . fund have, not only the authority, but the duty to insure that payments are

made to only those who are eligible." *Feathers v. U.M.W. Health and Retirement Funds*, 99 L.R.R.M. 2287 (D.D.C. 1978).[12] The fiduciaries of a plan must jealously guard the benefit security of *all* participants.

ERISA imposes far more severe liability for breach of fiduciary duties to the plan than for making errors in particular benefit determinations. ERISA Section 502 (a)(1)(B) 29 U.S.C. § 1132(a)(1)(B), protects the rights of individual participants by providing for full recovery of benefits due from the plan, but does not provide for any recovery from plan fiduciaries. The strongest remedy is reserved by ERISA Section 409 to fiduciary breaches against the benefit security of all participants. That section authorizes recovery from plan fiduciaries only on behalf of the plan as a whole for the benefit of the plan itself. Section 409 does *not* provide for recovery from trustees (or other fiduciaries) by individual beneficiaries.

The Ninth Circuit's interpretation of ERISA Section 409 substantially ignores the fact that fiduciary responsibility under ERISA is to the plan as a whole as well as to individual participants. Its decision, if allowed to stand, will lead plan fiduciaries to be fearful of litigation and of personal liability whenever they review claims. This very justified fear will significantly distort the entire decision making process concerning claims. Trustees will be far more likely to acquiesce in the payment of questionable claims. While the approval of one questionable claim will not likely weaken a plan, the cumulative effect of trustee acquiescences to such claims over time will have that effect.

C. The Ninth Circuit's Ruling will Deter Qualified Persons from Serving as Fund Trustees and Administrators

Multiemployer benefit plans are primarily labor-management funds that are administered by joint boards

[12] See also *Moglia v. Geogheghan*, 403 F.2d 110, 116 (2nd Cir. 1968); *Brune v. Morse*, 475 F.2d 858 (8th Cir. 1973); *Bayles v. Central States, Southeast, Etc.*, 602 F.2d 97 (5th Cir. 1979).

of labor and management trustees. Multiemployer plans are frequently administered by management trustees who work for geographically dispersed companies (many of them quite small) and by union trustees who are also frequently dispersed geographically.

Labor and management trustees generally do not get paid for their time because such payments are prohibited by ERISA Section 408(a)(2), 29 U.S.C. § 1108(a)(2). Trustees of multiemployer plans receive no institutional rewards for their service. Employer trustees must forego management of their business and may lose income because they take time to serve as trustees; union trustees must forego their organizing tasks. Multiemployer plan trustees agree to serve because of a serious commitment to employee benefit security and because of a desire to perform a service to their union members or to their employees.

Trustees are well aware that the fiduciary requirements of ERISA mandate prudent, honest and selfless plan administration. They are also aware that fiduciary breaches injurious to the fund may result in the imposition of personal liability against them to remedy any injury caused to the fund. Generally speaking, fiduciaries can fulfill their obligations and avoid breaches of fiduciary duty by carefully selecting investment managers, accountants, and administrators to perform the day-to-day administrative tasks of the fund, and by periodic review of plan reports, operations, and policies.

Prior to the decision of the Ninth Circuit in this matter, trustees did not fear that personal liability might arise from every ministerial task performed by plan employees or agents. Thus, prior to the Ninth Circuit's decision, responsible individuals with sound financial and administrative skills have been willing to serve as trustees of multiemployer funds because they could adequately perform their fiduciary duties by providing management and direction without direct involvement in claim processing details.

By drastically expanding the scope of personal liability of trustees beyond that contemplated by ERISA, the

Ninth Circuit has provided a powerful disincentive for any reasoning person from serving as trustee of a multiemployer plan. Now, the otherwise responsible, prudent trustee is personally liable for any delays or errors of judgment in routine individual claims processing. The Ninth Circuit has made it virtually impossible for the traditional multiemployer trustee to function. Trustees will fear that, unless they maintain personal involvement in daily fund activities, they will not be able to monitor their own exposure to liability. Since multiemployer trustees are generally not compensated, it will be virtually impossible to find competent labor and management trustees willing to serve in the face of such risk.

Similarly, competent individuals with administrative and financial expertise will be deterred from serving as administrators of multiemployer plans because each daily task that they perform may result in substantial personal liability.

D. The Ninth Circuit's Ruling is Injurious to the Dispute Resolution Process Favored by ERISA

ERISA Section 503, 29 U.S.C. § 1133, and regulations promulgated thereunder, favor internal administrative resolution of disputes concerning benefit claims. Section 503 requires plans to provide adequate notice and explanation of any denial of benefits and a "full and fair review" to all claimants who appeal denials of benefits. This general provision is further elaborated by regulations set forth at 29 C.F.R. § 2560.503-1.

The regulations impose certain requirements for reasonable claims procedures established by plans. Plans must provide for reasonable claim filing procedures that must be communicated to participants. If such procedures are not established, a claim is deemed filed when the participant brings it to the attention of the plan.

Plans must also provide notice and explanation of any denials of claims within 90 days, or, at the most, within 180 days if special circumstances exist. The notice must set forth (1) the reason for benefit denial; (2) the plan

provisions on which denial is based; (3) a description of any additional information or materials needed to perfect the claim; and (4) information about how to obtain a review of the denial of benefits.

Finally, plan participants must be given the opportunity to appeal denied claims to the appropriate fiduciary or to a person designated by the fiduciary. The participant must be given access to all pertinent plan documents and an opportunity to submit issues and comments in writing. The decision on review must be made promptly, usually within 60 days after receipt of the request for review, or, under special circumstances (such as the scheduling of hearing) within 120 days after receipt.

The procedures outlined above are designed to promote dispute resolution through the exchange of information by plans and participants. The procedures require a plan to disclose the reasoning behind every denial of benefits and to state if any additional information may change the results. This gives participants the opportunity to offer relevant counter arguments and to submit relevant information that might have been originally overlooked. The resulting process is an essentially nonadversarial dialogue between the plan and the participant that is designed to raise all the arguments and information pertinent to the denied claim and to avoid unnecessary litigation.

Courts have generally required claimants to exhaust their internal plan remedies before filing suit under ERISA Section 502. See e.g. *Lucas v. Warner & Swasey Company*, 475 F. Supp. 1071 (E. D. Pa. 1979); *Kross v. Western Electric Co., Inc.*, 701 F.2d 1238 (7th Cir. 1983), aff'g in part and rev'g in part 534 F. Supp. 251 (1982). This is so because the dispute resolution mechanism provided by ERISA is so well-suited for resolving disputes that are based on a misunderstanding of plan rules or on incomplete information. Because the internal dispute resolution mechanisms of plans so success-

fully accomplish their purposes, the federal courts are not overburdened by litigation of benefit claim disputes.

The case at bar is a good example of the proper functioning of internal plan dispute resolution. The participant was advised of the specific reasons for the denial of her claim, had the opportunity to, and did present, additional information, and was ultimately granted full benefits on the basis of information obtained through the dispute resolution process.

The Ninth Circuit's decision will irretrievably damage this valuable and efficient process. Since plan trustees and administrators will now be subject to litigation and to grave personal liability for the performance of even routine ministerial plan functions, they will have a tendency to be guarded and cautious when dealing with benefit denial claims. They will be hesitant to set forth all the issues frankly and will be reluctant to receive any additional information. They will also be concerned that any change in a benefit determination result may be used as evidence of impropriety. Flexibility in plan administration will inevitably be reduced, thereby resulting in even more litigation. Indeed, some participants may be encouraged to forego a settlement resolution without litigation in the hopes of obtaining a windfall award of punitive damages.

Before the Ninth Circuit's decision, litigation over benefit claims denials could only result in full payment of the disputed claim and costs. Now, such litigation also threatens unknown, potentially enormous personal liability. The change in fiduciaries' behavior resulting from this new liability concern will decrease the internal resolution of benefit claim disputes and significantly increase the volume of litigation in already burdened federal courts.

E. Compensatory and Punitive Damages are not Uniformly Awarded and are Frequently Large and Inconsistent

The compensatory and punitive damages permitted by the Ninth Circuit are entirely unpredictable in amount and may result in inconsistent, large awards.

Compensatory damages include damages for all losses and injuries sustained by a claimant whose claim has been mishandled,[13] including damages for mental anguish that is accompanied by some physical injury.[14] Mental anguish has been variously defined as nervous shock, fright, or humiliation.[15] There is no standard of law by which asserted damages of this nature can be verified or measured. The amount to be awarded is necessarily arbitrary,[16] and may amount to thousands or hundreds of thousands of dollars.

Punitive damages are even less predictable. They do not compensate the claimant for any actual injuries.[17] Punitive damages amounts are not subject to rules of any sort and are frequently arbitrary. The following recent examples of punitive damages awards in California state court litigation illustrate this point: [18]

Name of Case	Superior Court	Type of Case	Actual Damages	Punitive Damages
Triple E. Machinery v. Englebrecht	Norwalk	Embarrassment and humiliation	$ 50,000	$ 102,327
Spleker v. Senator Hotel	Sacramento	Breach of contract	$343,310	$3,117,946

[13] See 22 Am. Jur. 2d, Damages § 11, n.12.

[14] See 22 Am. Jur. 2d, Damages § 195.

[15] See 38 Am. Jur. 2d, Fright, Shock, and Mental Disturbance, § 45.

[16] See 22 Am. Jur. 2d, Damages, §§ 109, 198.

[17] See 22 Am. Jur. 2d, Damages, §§ 236, 237, 238.

[18] *Jury Verdicts Weekly*, Volumes (26) (1982), (27) (1983), and (28) (1984) Jury Verdicts Inc. Santa Rosa, California.

Name of Case	Superior Court	Type of Case	Actual Damages	Punitive Damages
Hare v. Kearney Mesa Volkswagen	San Diego	Wrongful reposses-sion of automobile	$ 30,000	$ 275,000
Sullivan v. Kaiser Foundation Health Plan	San Diego	Failure to pay medical claim	$ 45,000	$ 400,000
Coconis v. Ins. Co. North America	San Francisco	Insurance bad faith	$ 3,500	$ 20,000
Gump v. Wells Bank	San Francisco	Breach of trust	$ 34,339	$1,000,000
Garvey v. State Farm	Sonoma	Insurance bad faith	$ 47,593	$1,110,000
Thompson v. Thompson	Sonoma	Breach of fiduciary duties—real estate	$ 17,000	$ 30,000

As is evident from these examples, no fiduciary will be able to predict the amount of his or her personal liability exposure.

The availability of insurance coverage for punitive and compensatory damages is doubtful at this time. But, even if such coverage ultimately became available, it would, no doubt, be prohibitively expensive.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted in this case. Unless the Ninth Circuit's decision is reversed, growth of multi-employer plans will be effectively ended.

Respectfully submitted,

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